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IN THE

Supreme Court of the United States

BELINDA DUPUY, ET AL.,
PETITIONERS,

v.

ERWIN MCEWEN, DIRECTOR, ILLINOIS DEPARTMENT OF CHILDREN AND FAMILY SERVICES.
RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE ILLINOIS STATE BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The Illinois State Bar Association (the "ISBA") is an organization dedicated to improving the administration of justice. Formed in 1877 by a group of forward-thinking lawyers and judges, the ISBA remains firmly committed to a variety of equal justice initiatives. The ISBA is dedicated to ensuring that State intervention in the protected sphere of family life comports with the rule of law. Accordingly, the ISBA has a strong interest in this Court's review, and ultimate reversal, of the Seventh Circuit's decision in this case.

SUMMARY OF ARGUMENT

The Seventh Circuit's decision threatens to deprive families in Illinois and elsewhere of fundamental Due Process rights that attach when the State seeks to separate children from their parents. The interest of parents in the custody, care, and upbringing of their children is among the oldest and most venerable fundamental rights recognized by this Court. No less vital is the right of children to remain, whenever possible, under the physical and

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[1] Pursuant to Rule 37.2 of the Rules of this Court, counsel of record for both parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk. Counsel for all parties received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief as required by Supreme Court Rule 37.2(a). No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

emotional care of their parents. As with the formal removal of a child from the home, the imposition of a "safety plan" in Illinois impinges on both of these rights, often permitting State officials to separate children from their parents for weeks or even months at a time. Yet the Seventh Circuit in this case upheld the policy of the Illinois Department of Children and Family Services ("DCFS"), which routinely imposes safety plans on families based only on the "mere suspicion" of child abuse. Under DCFS's procedures, parents are not entitled to know the details of the allegations against them, and the State provides no mechanism for any type of hearing before a neutral decision maker either before or shortly after a safety plan is imposed.

Review by this Court is urgently needed. The safety plans at issue in this case impact an estimated 10,000 families in Illinois each year. *See* Pet. App. 41a. Moreover, the consequences of the Seventh Circuit's decision will extend far beyond Illinois. For example, of the five states that border Illinois, at least four appear to have implemented safety plan procedures similar to those used by the Illinois DCFS, without any evident Due Process protections.[2]

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[2] *See* Wisconsin Bureau of Programs & Policies, *Child Protective Services: Safety Intervention Standards*, Wisc. DCFS Memo No. 2006-09, at 7, 28 (issued May 2, 2006) *available at* http://dhfs.wisconsin.gov/dcfs_info/ (describing circumstances in which safety plans can be used); Iowa Dep't of Human Servs., *New Child Welfare Service Array: Enhancing Systems Collaboration*, *available at* http://www.dhs.state.ia.us/dhs/dhs_homepage/index.html (same); Mo. Child Welfare Manual § 2, ch. 9.2, *available at* http://www.dss.mo.gov/cd/info/cwmanual/section2/ch9/sec2ch9s

In contrast to Illinois's safety plan procedures, certain other states and localities require state actors to provide evidentiary support for safety plans imposed on families and submit such plans to judicial review.[3] Such safeguards are a constitutional necessity; they should not be a matter of state discretion. Without guidance from the Court, the Seventh Circuit's decision threatens to leave families more vulnerable to potentially indefinite state intrusions without the opportunity for any meaningful hearing or judicial oversight.

This Court's review is particularly appropriate because the Seventh Circuit's decision conflicts with this Court's settled Due Process jurisprudence and is at odds with every other Circuit decision that has addressed Due Process protections in this context. This Court has made clear that when fundamental, constitutionally protected liberty interests are at stake, Due Process requires, at a minimum, notice of the bases for state action and the opportunity for a hearing at a meaningful time and in a meaningful

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ub2.htm (same); Ky. Standards of Practice: Completion of Continuous Quality Assessment, *available at* https://apps.chfs.ky.gov/pandp_process/cqa_sop.htm (same).

[3] *See, e.g.* Me. Dep't of Health & Human Services, *A Guide to Child Protective Services*, *available at* http://www.maine.gov/dhhs/bcfs/handbook.pdf (safety plans implemented only for cases of substantiated child abuse); Allegheny Cty. Dep't of Human Services, *Safety Plans and Interventions*, CYF Memo No. 008 (August 2006), *available at* http://www.dhs.county.allegheny.pa.us/uploadedFiles/DHS/About_DHS/Publications/Resource_Guides/008SafetyPlns.pdf (providing for judicial review of safety plans).

manner. Until now, the Courts of Appeals have uniformly recognized that even temporary deprivations of child custody require a prompt hearing and a stricter standard of proof than "mere suspicion." The Seventh Circuit stands alone in discarding these well-established Due Process protections and allowing state officials to evade even these basic fundamental constitutional safeguards.

Moreover, the Seventh Circuit's only justification for doing away with these constitutional safeguards—that the plaintiff parents had consented to the safety plans and therefore waived any rights to process—conflicts directly with decisions of this Court holding that individuals' waiver of their fundamental Due Process rights cannot be truly voluntary unless the waiver is free of state coercion and knowingly made. Specifically, the lower court's rationale cannot be reconciled with the Court's "unconstitutional conditions" doctrine, which prevents the government from offering an ostensible "benefit" in order to exert overwhelming pressure on individuals to waive their rights. *See United States v. Jackson,* 390 U.S. 570 (1968). In addition to being unconstitutionally coercive, Illinois's safety plan system never ensures that parents' waivers are made knowingly. A defendant who pleads guilty to a crime is at least afforded a hearing before a neutral magistrate who determines whether the plea is entered into knowingly and voluntarily. Notwithstanding the onerous burden safety plans place on families, Illinois affords no such procedural protections to parents who "consent" to them.

The Seventh Circuit has thus sanctioned "voluntary" safety plans as a mechanism for the states to avoid affording families universally recognized constitutional protections. This Court should grant *certiorari* to review the Seventh Circuit's decision and bring it in line with other Courts of Appeals' and this Court's precedents.

ARGUMENT

I. The Seventh Circuit's Decision Conflicts with This Court's Due Process Jurisprudence Requiring Timely Notice and a Meaningful Hearing Whenever the Government Seeks to Deprive Persons of Fundamental Constitutional Interests.

In a long line of cases covering a wide variety of circumstances, this Court has consistently required the government to provide certain basic procedural protections whenever it deprives persons of constitutionally protected liberty and property interests. *See e.g., Jones v. Flowers*, 547 U.S. 220 (2006) (tax sale of property); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (detention of enemy combatants); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985) (suspension from public school); *Mathews v. Eldridge*, 424 U.S. 319 (1976) (suspension of disability benefits); *Bell v. Burson*, 402 U.S. 535 (1971) (revocation of driver's license and registration); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (termination of welfare benefits); *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337, 341-42 (1969) (garnishment of wages); *Armstrong v. Manzo*, 380 U.S. 545 (1965) (termination of parental rights).

The Seventh Circuit's decision discards this well-settled jurisprudence.

Indeed, familial association and autonomy "is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *see M.L.B. v. S.L.J.*, 519 U.S 102, 116 (1996) (familial autonomy is of "basic importance in our society" (quotations omitted)). The State triggers Due Process requirements when it impairs the right of parents to control the upbringing of their children and the reciprocal right of children not to be "dislocated from the 'emotional attachments . . . derived from the intimacy of daily association' with their parents." *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977) (quoting *Smith v. Org. of Foster Families for Equality and Reform*, 431 U.S. 816, 844 (1977)). Even interference falling short of formal, permanent separation is permissible only to protect the State's compelling interest in ensuring child safety when a parent is unfit. *Troxel*, 530 U.S. at 68-69.

Illinois's imposition of safety plans in this case unquestionably impairs constitutionally protected interests. When confronted with such significant impairments, this Court has consistently held that Due Process requires, at a minimum, notice of the bases for state action and the opportunity for a hearing "at a meaningful time and in a meaningful manner." *Loudermill*, 470 U.S. at 538; *Armstrong*, 380 U.S. at 552. Beyond these basic requirements, the specific amount of process due must be assessed by weighing the nature of the protected interest, the risk of an erroneous deprivation through the

procedures used, the probable value of any additional procedures, and the interests of the government, both in effectuating the deprivation and in maintaining the procedural status quo. *See Mathews*, 424 U.S. at 335.

As a practical matter, the government must virtually always provide notice and an opportunity for a meaningful hearing either before or shortly after any significant deprivation of a constitutionally protected interest. The baseline rule is that significant deprivations of liberty or property require notice and a meaningful hearing prior to the deprivation. *See, e.g.*, *Jones*, 547 U.S. at 223; *Bell*, 402 U.S. at 542; *Goldberg*, 397 U.S. at 263-64; *Sniadach*, 395 U.S. at 341-42; *Armstrong*, 380 U.S. at 552.

Under certain circumstances, usually involving temporary deprivations, the government may substitute a post-deprivation hearing, but only when "accompanied by a substantial assurance that [the deprivation] is not baseless or unwarranted." *FDIC v. Mallen*, 486 U.S. 230, 240 (1988) (temporary suspension of federally regulated employment); *Mathews*, 424 U.S. at 340 (temporary suspension of disability benefits). Even in these situations, however, the government must provide advance notice of the reasons for the deprivation, and the factual bases underlying such reasons. *See Loudermill*, 470 U.S. at 542-46.

Finally, certain "extraordinary" circumstances may justify the postponement of both notice and a

hearing. *Fuentes v. Shevin*, 407 U.S. 67, 91 (1972).[4] Even in such "extraordinary" circumstances, however, notice and a hearing before a neutral decisionmaker must still be provided "promptly" following deprivation. *See County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991).

The Seventh Circuit did not hold, and there is no indication in the record, that all or even most safety plans are imposed in extraordinary circumstances that would justify postponing both notice and the right to a hearing. Moreover, even where bona fide concerns for child safety and well-being in "emergency" situations do justify a degree of procedural flexibility, *see infra,* Part II, under no circumstances may the State disregard the basic requirements of Due Process altogether. Yet such is the effect of the safety plan framework sanctioned by the Seventh Circuit in this case. Indeed, the Illinois DCFS often separates parents from their children for

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[4] For example, summary seizure of property may sometimes be permissible "to collect internal revenue of the United States, to meet the needs of a national war effort, to protect against the economic disaster of a bank failure, and to protect the public from misbranded drugs and contaminated food." *Fuentes*, 407 U.S. at 92 (footnotes omitted). *But see Jones*, 547 U.S. at 223 (Due Process requires notice and hearing prior to tax sale of property). Warrantless arrests and detention of suspected perpetrators in municipal jails, which implicate Fourth Amendment protections analogous to Due Process, may sometimes be justified to protect public safety. *See County of Riverside v. McLaughlin*, 500 U.S. 44, 53 (1991). In what is arguably the most extreme case, suspected "enemy combatants" may be detained to ensure that such individuals do not return to battle against the United States in a time of war. *Hamdi*, 542 U.S. at 533.

weeks or even months at a time, and otherwise interferes in family life, without ever informing parents of the allegations against them or presenting those allegations to a neutral decisionmaker. *See* Pet. App. 45a, 50a, 85a, 93a. Such a complete absence of Due Process is plainly unconstitutional.

II. The Seventh Circuit's Decision Is At Odds With Every Other Federal Court of Appeals Decision that Has Addressed Due Process Protections in the Context of Significant State Interference in Family Life.

Every federal Court of Appeals to confront the issue has afforded basic procedural Due Process rights when state and local governments significantly interfere with family life. All parties to this case agree that such interference in family life may sometimes be necessary to protect children. No other Court of Appeals, however, has ever entirely disregarded the procedural Due Process rights of families in such contexts.[5]

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[5] The other Courts of Appeals have addressed the Due Process rights of families in circumstances ranging from truancy and suspected neglect, *see e.g., Jordan ex rel Jordan v. Jackson*, 15 F.3d 333, 336-37 (4th Cir. 1994) (child was home alone), to suspected "emergency" situations where prompt official action may be needed to prevent immediate physical injury to a child, *see, e.g., Hatch v. Dep't for Children, Youth & Their Families*, 274 F.3d 12, 17 (1st Cir. 2001) (child had bruises suggesting possible physical abuse). While most of these cases involve the temporary removal of children from their parents' homes, at least one other Court of Appeals has addressed state efforts to remove parents from their children. *See Croft v. Westmoreland County Children & Youth Servs.*, 103 F.3d 1123 (3d Cir. 1997). The *Croft* court could "discern no rational distinction" between

A. The Courts of Appeals Have Uniformly Required Prompt Notice and Post-Deprivation Review of State Action.

Even where immediate interference with family life is justified due to a potential "emergency," Courts of Appeals have uniformly held that Due Process requirements "are not eliminated, but merely postponed." *Weller v. Baltimore Dep't of Social Servs.*, 901 F.2d 387, 393 (4th Cir. 1990) (quotations omitted); *see also Hooks v. Hooks*, 771 F.2d 935, 942 (6th Cir. 1985); *Duchesne*, 566 F.2d at 826. Under no circumstances does the possibility that a child is in imminent danger relieve the State of its obligation to promptly provide parents with notice of the allegations against them and a meaningful opportunity to be heard. *Id.* at 828. It is the State's burden to initiate prompt judicial review: The State "cannot be allowed to take action depriving individuals of a most basic and essential liberty interest which those uneducated and uniformed in legal intricacies may allow to go unchallenged for a long period of time." *Id.*

Thus, the Courts of Appeals have almost always required that a post-deprivation hearing be held within hours or days, *see Jordan ex rel Jordan v. Jackson*, 15 F.3d 333,,351 (4th Cir. 1994) (delay of 65 hours "is near, if not at, the outer limit of permissible delay"); *Berman v. Young*, 291 F.3d 976, 985 (7th Cir. 2002) (describing a 72-hour delay as "rather

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removal of a child and the forced departure of parent, given that both situations involve the forced separation of otherwise intact families. *Id.* at 1126 & n.4.

outrageous"), and not weeks or months.[6] In requiring such speedy review of governmental interference in family life, the Courts of Appeals have been cognizant of the fact that the right to familial integrity carries—in Justice Frankfurter's words—"a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." *Duchesne*, 566 F.2d at 828 & n.26 (quoting *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring)).

The lower courts have also noted that prompt notice and a hearing are essential to minimize the risk of an erroneous intervention. As Judge Luttig observed in *Jordan*: "The fact of certain and prompt review by superiors and, indeed, a court, not to mention the scrutiny that parental notification assures, is bound to discipline the exercise of the [the State's] emergency removal power . . . further reducing the risk that the initial removal will be effected without cause." *Jordan*, 15 F.3d at 347. The disciplining effect of a meaningful review is therefore indispensable to the even-handed administration of justice.

Minimizing the risk of erroneous interventions in the parent-child relationship ultimately serves the interests not only of families but also of the State itself as *parens patriae*. There is near universal agreement that children benefit when the integrity of

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[6] *See, e.g., Eidson v. Tenn. Dep't of Children's Servs.*, 510 F.3d 631, 634-35 (6th Cir. 2007) (claim of 7-month delay sufficient to state colorable Due Process claim); *Weller*, 901 F.2d at 396 (4-month delay violates Due Process); *Duchesne*, 566 F.2d at 826 (36-month delay violates Due Process).

their families is preserved. Accordingly, "[s]ince the state has an urgent interest in the welfare of the child, it shares the parent's interest in an accurate and just decision" that does not wrongly deprive the parent of custody and control. *Lassiter v. Dep't of Social Servs.*, 452 U.S. 18, 27 (1981). The mutual goal of promoting every child's welfare is best served by "procedures that promote an accurate determination of whether the natural parents can and will provide a normal home." *Santosky v. Kramer*, 455 U.S. 745, 767 (1982). Without such procedures, there is a greater risk of careless, irresponsible disruptions to family life, which will have a deleterious effect not only on the private interests of individuals but also the public goals of the State itself.

B. The Courts of Appeals Have Required More than "Mere Suspicion" of Neglect or Abuse to Justify State Intervention.

In addition to mandating a prompt hearing, the Courts of Appeals have held that Due Process requires that government officials have a firm basis for believing that abuse is occurring before interfering significantly in the parent-child relationship.

Most Courts of Appeals confronting the issue have held that such a basis must at least rise to the level of a "reasonable and articulable" or "objectively reasonable" suspicion that child abuse has taken or will imminently take place in order for the officials in question to avoid liability. *See, e.g.*, *Hatch v. Dep't for Children, Youth & Their Families*, 274 F.3d 12,

20-21 (1st Cir. 2001); *Brokaw v. Mercer County*, 235 F,.3d 1000, 1019 (7th Cir. 2000); *Croft v. Westmoreland County Children & Youth Servs.*, 103 F.3d 1123, 1126 (3d Cir. 1997); *Gottlieb v. County of Orange*, 84 F.3d 511, 517 (2d Cir. 1996); *Thomason v. SCAN Volunteer Servs., Inc.*, 85 F.3d 1365, 1371 (8th Cir. 1996). At least one Court of Appeals has imposed a seemingly more stringent standard, requiring state officials to have "reasonable cause to believe that the child is in imminent danger of serious bodily injury." *Wallis v. Spencer*, 202 F.3d 1126, 1138 (9th Cir. 2000).[7]

Regardless of the specific standard employed, some threshold test is necessary to demarcate the point at which the family's interests in remaining together as a family are outweighed by the State's interests as *parens patriae*. *See Hatch*, 274 F.3d at 21; *Thomason*, 85 F.3d at 1373. Like the requirements of prompt notice and a hearing, such a threshold test forces state officials to conduct at least a "minimally adequate" investigation before interfering with a parent's control of his or her children. *Doe v. Hennepin County*, 858 F.2d 1325,

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[7] This inquiry is somewhat analogous to a Fourth Amendment probable cause or reasonable suspicion determination by a police officer conducting a warrantless search or arrest. *Cf. Texas v. Brown*, 460 U.S. 730, 742 (1983) (probable cause for search); *Terry v. Ohio*, 392 U.S. 1, 22-23 (1968) (reasonable suspicion for stop-and-frisk); *Beck v. Ohio*, 379 U.S. 89, 91-92 (1964) (probable cause for arrest). As with an individual's bodily and personal integrity, state officials cannot interfere with the integrity of a parent-child relationship without some reasonable basis to believe that a governmental invasion is warranted.

1329-30 (8th Cir. 1988) (Henley, J., concurring). Such investigations in turn help to prevent inappropriate or irresponsible interventions. In *Wallis*, for example, children were removed from their home based solely on allegations of Satan worship by a mentally disturbed relative who had a history of making false reports. *See Wallis*, 202 F.3d at 1138-39. In *Croft*, state intervention was triggered by an uncorroborated anonymous tip that itself constituted only hearsay. *See Croft*, 103 F.3d at 1126-27. In both cases, the courts held that family life could not be disrupted in accordance with Due Process based on such tenuous allegations. *See Wallis*, 202 F.3d at 1139; *Croft*, 103 F.3d at 1127.

Whether deprivation of the right to familial integrity takes the form of forced removal or a "voluntary" safety plan, Due Process requires the State to act reasonably and on reliable information when taking action that significantly interferes with the relationship between a child and his or her parents. The Seventh Circuit's decision sanctions a constitutionally impermissible end-run around these well-established Due Process requirements by requiring no evidentiary showing by the State to justify implemention of a safety plan.

III. The Seventh Circuit's Decision Conflicts With This Court's Precedents Holding that Waivers of Fundamental Due Process Rights Must be Free of Undue State Burdens and Made Knowingly and Voluntarily.

Illinois attempts to shield its practices from judicial oversight by cloaking safety plans in the

legal fiction of the parents' "consent," an argument the Seventh Circuit adopted as the core rationale for its decision. *See* Pet. App. 13a-17a. The Seventh Circuit's reasoning is fundamentally incompatible with both the "unconstitutional conditions" doctrine and established precedents regarding the requirements for truly voluntary waiver of procedural Due Process rights.

A. The Seventh Circuit's Decision Is At Odds With This Court's "Unconstitutional Conditions" Jurisprudence.

Contrary to the Seventh Circuit's view, this Court has long recognized that individuals may, in fact, be "disadvantaged by having more rather than fewer options," Pet. App. 16a, when the government uses its overwhelming leverage to induce them into sacrificing constitutional rights in exchange for a particular "benefit." *See Jackson,* 390 U.S. at 581; *Frost v. RR Comm'n of Cal.*, 271 U.S. 583, 593 (1926). The "choice" offered in such cases is not akin to deciding between a martini and a manhattan, as the Seventh Circuit characterized the parents' dilemma in this case, Pet. App. 16a, but rather to choosing "between the rock and the whirlpool." *Frost*, 271 U.S. at 593.

This Court explained the pernicious nature of such a choice in *Jackson.* The *Jackson* Court invalidated a provision of the Federal Kidnapping Act that authorized the death penalty after a jury trial, but contained no procedure for imposing the death penalty upon a defendant who waived his or her right to a jury trial or pleaded guilty. This Court

held that the death penalty provision was unconstitutional because it had the "inevitable effect" of "discourag[ing] assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial." *Jackson*, 390 U.S. at 581 (footnote omitted). This Court explained that "the evil in the federal statute is not that it necessarily coerces guilty pleas and jury waivers but simply that it needlessly encourages them. A procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of a constitutional right." *Id.* at 583; *see also North Carolina v. Pearce*, 395 U.S. 711 (1969) (holding that the State may not burden appellate rights by imposing harsher sentence on remand).

The risk of indefinitely losing a child similarly chills the parents' right to retain custody of their children and to maintain their innocence of the charges against them. Here, as in *Jackson*, the State offers an ostensible "benefit," namely implementation of a safety plan in lieu of protective custody, but only if parents agree not to assert their own and their children's substantive and procedural Due Process rights. There can be no stronger evidence of a chilling or deterrent effect on basic constitutional rights than the fact that every single parent faced with the offer of safety plan "chose" to waive his or her Due Process rights. *See* Pet. App. 44a, 94a. The State's ability to exert this kind of overwhelming pressure on parents is all the more problematic in light of the exceptionally low "mere suspicion" threshold for state action.

In order for the safety plan scheme to pass constitutional muster, Due Process protections may not attach exclusively to the "option" any reasonable parent would find unthinkable. By ensuring that parents will never reject a safety plan, the State improperly circumvents the procedural Due Process requirements that currently attach only to protective custody.[8] Such a system provides an incentive for arbitrary government action—a disservice to children, families, and the State itself. Only comparable Due Process protections for the imposition of safety plans and protective custody would uphold the true voluntariness of a parent's consent to a safety plan, limit the chance of erroneous intervention, and ensure that DCFS investigators do not come to view safety plans as an acceptable alternative to well-established Due Process requirements.

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[8] The procedural requirements for taking a child into protective custody are enshrined in the Abused and Neglected Child Reporting Act, 325 ILCS 5/5, and the Juvenile Court Act, 705 ILCS 405/2-7(1), 405/2-8, 405/2-9. These statutes together provide that if the State of Illinois "(1) . . . has reason to believe that the child cannot be cared for at home or in the custody of the person responsible for the child's welfare without endangering the child's health or safety; and (2) there is not time to apply for a court order . . . for temporary custody of the child," the State can immediately take the child into "temporary protective custody," 325 ILCS 5/5, but there is a right to a judicial hearing within 48 hours, 705 ILCS 405/2-9(1), and (3).

B. The Seventh Circuit's Decision Contradicts this Court's Precedent Requiring Procedures to Ensure that Waiver is Made Knowingly and Voluntarily.

DCFS's extraction of parents' consent suffers from another serious constitutional flaw. Under the framework endorsed by the Seventh Circuit, the DCFS never informs parents of the rights they are waiving by agreeing to a safety plan. *See* Pet. App. 45a, 50a. In order for their waiver of rights to be knowing and voluntary, parents must be informed of the law in relation to the facts alleged against them. *See Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (citing *McCarthy v. United States*, 394 U.S. 459, 467 (1969)).

The Seventh Circuit's comparisons to plea bargaining only illuminate the constitutional flaws in DCFS's procedures. In the Seventh Circuit's view, a parent who agrees to a safety plan in the hope of avoiding a custody hearing is in the same position as a criminal defendant who pleads guilty "to obtain a more lenient outcome than he could expect if he went to trial." Pet. App. 17a. According to the Seventh Circuit, "[b]ecause the safety plan is voluntary, no hearing of any kind is necessary; hearings are required for deprivations ordered over objection, not for steps authorized by consent." *Id.* at 15a.

In making this analogy, the Seventh Circuit overlooked the robust set of procedural rights that criminal defendants are afforded even when they plead guilty. A defendant who pleads guilty is entitled to a hearing to ensure that the waiver of his

or her constitutional rights is knowing and voluntary, and not the result of improper government threats or promises. Federal Rule of Criminal Procedure 11 provides that before the court accepts a guilty plea, "the court must address the defendant personally in open court" and "inform the defendant of, and determine that the defendant understands" the Fifth and Sixth Amendment rights he or she will be waiving by pleading guilty. Fed. R. Crim. P. 11(b). The court must also "address the defendant personally in open court [and] determine that the plea is voluntary" and did not result from force or unlawful threats, and must determine that the plea is supported by an actual basis in fact. Fed. R. Crim. P. 11(b), (c). These procedures—which are designed to ensure that a plea is knowing and voluntary—codify constitutional requirements that apply with equal force to the states. *See Boykin*, 395 U.S. at 243; *id.* at 245 (Harlan, J., dissenting).[9]

In stating that no hearing is necessary because the safety plans are voluntary, the Seventh Circuit thus got the analysis backwards. A hearing is necessary in order to determine whether the safety plan is truly knowing and voluntary in the first

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[9] The Seventh Circuit also compared acceptance of the safety plan to a civil litigant's acceptance of a settlement. But this Court has made clear that child custody and control cases require far weightier protections than typical civil litigation over money damages. *See Santosky v. Kramer*, 455 U.S. 745, 755 (1982). Indeed these proceedings may "bear[] many of the indicia of a criminal trial." *Id.* at 762; *cf. Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring) (stating that right to familial integrity carries "momentum for respect" far greater than any that for any shifting economic entitlement).

place. "Requiring this examination of the relation between the law and the acts the defendant admits to having committed is designed to protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge." *McCarthy v. United States*, 394 U.S. 459, 467 (1969) (quotation marks, citation, and footnote omitted). Like a criminal defendant deciding whether or not to plead guilty, in order to assess the pros and cons of accepting a safety plan, a parent would need to know his or her rights and the limits of the DCFS's removal power. Parents are unable to "stand on their rights" when they do not know what those rights are.

The record shows that parents subjected to safety plans were not in fact apprised of their rights. Pet. App. 41a, 45a-46a. DCFS investigators do not inform the parents who are the target of the investigation of DCFS's basis for the safety plan demand, including the safety factors DCFS found to be present and the reasons why it concluded the child is "unsafe." *Id.* at 45a. Nor do they explain to parents the legal procedures DCFS would need to follow or the quantity of evidence that would be required for the agency lawfully to remove a child from the home. *Id.* at 45a, 95a. Without being informed that the law does not allow the State to take a child into custody on the basis of mere suspicion, a parent's agreement to a safety plan is not knowing and voluntary. "Ignorance, incomprehension, coercion, terror, inducements,

subtle or blatant threats might be a perfect cover-up of unconstitutionality." *Boykin*, 395 U.S. at 242-43.

In sum, the Seventh Circuit has sanctioned a deprivation of the substantive Due Process rights of parents and children alike without any procedural safeguards and based solely on the unsustainable legal fiction of parental consent. The decision is incompatible with this Court's jurisprudence and at odds with every Court of Appeals that has opined on the procedural Due Process rights of families in the face of state intervention. It should be reversed.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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